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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JUDITH M. PRITZLAFF,

Petitioner,

v.

ARCHDIOCESE OF MILWAUKEE, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Wisconsin Supreme Court

PETITION FOR WRIT OF CERTIORARI

ROBERT L. ELLIOTT, Esq.
Counsel of Record
TIMOTHY J. CESAR, Esq.
HAUSMANN-McNALLY, S.C.
633 West Wisconsin Avenue
Suite 2000
Milwaukee, Wisconsin 53203
(414) 271-5300

ROBERT S. SOSNAY, Esq.
10721 West Capitol Drive
Suite 207
Milwaukee, Wisconsin 53222
(414) 527-0100

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

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QUESTIONS PRESENTED

1. Does the First Amendment to the United States Constitution prohibit courts from imposing civil liability on religious organizations for acts arising out of secular activities?

2. Does the equal protection clause of the Fourteenth Amendment to the United States Constitution prohibit state courts from refusing to afford the same protections to one class of victims of sexual assault by parish priests as already afforded to the victims abused by their parents?

3. Does the due process clause of the Fourteenth Amendment to the United States Constitution allow claims to be dismissed despite the fact that a plaintiff is unaware of the harm suffered and the parties responsible for such harm?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Wisconsin Supreme Court are those in the caption as well as Reverend John T. Donovan and Arizona Health Care Costs Containment System and Health Care Financing Administration.

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PETITION FOR WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Wisconsin Supreme Court entered in this action June 27, 1995, and the final judgment of the Wisconsin Supreme Court entered on September 19, 1995.

OPINION BELOW

The decision of the Wisconsin Supreme Court is reported at 533 N.W.2d 780 (Wis. 1995).

BASIS FOR JURISDICTION

The final judgment of the Wisconsin Supreme Court was entered on September 19, 1995. This Court has jurisdiction to review the judgment of the Wisconsin Supreme Court pursuant to 28 U.S.C. § 1257(a). In addition, this court may properly hear the Wisconsin Supreme Court's state law ruling on the statute of limitations, as the decision on this issue has unreasonably obstructed Petitioner's federal rights. *N.A.A.C.P. v. State of Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

United States Constitution, Amendment XIV:

No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . .

STATEMENT OF THE CASE

Petitioner, Pritzlaff, initially met Defendant Father Donovan when she was a high school student in the late 1950s. Donovan was employed as a priest by Defendant Archdiocese of Milwaukee (hereinafter referred to as "Archdiocese") throughout the period that he was acquainted with Pritzlaff, including the time frame in which Donovan worked as a priest at Pritzlaff's high school. Between 1959 and 1965, Donovan used his position as a priest to develop a relationship with Pritzlaff. Donovan then used his position to force and coerce Pritzlaff into having a sexual relationship with him without her consent. As a result of the molestation, Petitioner suffered severe emotional distress. The emotional distress, combined with coping mechanisms, caused Pritzlaff to suppress her injuries and rendered her unable to perceive the existence, nature or cause of said injuries.

In November 1992 Petitioner, Pritzlaff, sued in Milwaukee County Circuit Court to recover damages for the injuries inflicted by Donovan during the course of his employment with the Archdiocese. On April 26, 1993, the circuit court granted the defendants' motion to dismiss. The trial court found that the statute of limitations barred the Petitioner's claims. The court also dismissed the negligence claim against the Archdiocese premised upon a finding that no viable claim existed under respondeat superior because the alleged abuse could not have occurred in the scope of Donovan's employment.

On August 23, 1994, the court of appeals reversed, holding that the claims were not barred by the statute of limitations. Further, the court held that the trial court erred in declining to recognize the tort of negligent supervision. The court of appeals also affirmed the dismissal of the cause of action under respondeat superior. The Archdiocese petitioned the Wisconsin Supreme Court for review, but was not joined by Father Donovan.

A divided panel of the supreme court dismissed all claims against the Archdiocese on June 27, 1995. The majority concluded that the statute of limitations barred Petitioner's claims. The court refused to apply the discovery rule to Petitioner's action, despite a previous Wisconsin Supreme Court ruling accepting application of the discovery rule in factually similar incest cases.[1] The majority also found that the First Amendment to the U.S. Constitution precluded a civil suit against the Archdiocese for negligent supervision, as such a claim would require a constitutionally impermissible examination of church hiring practices. The court relied, in part, on *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), and *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), for its position that the U.S. Supreme Court would insulate religious organizations from civil liability for the tortious acts of employees. The court later rejected a motion to reconsider on September 19, 1995.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve questions regarding the interpretation of the judicial abstention doctrine, and the extent to which the doctrine insulates religious organizations from liability for their activities. The Wisconsin Supreme Court has construed the First Amendment as precluding civil suits filed against religious organizations. The decision below provides virtually unlimited immunity for religious organizations for their secular activities. The strict construction of the First Amendment adopted by the Wisconsin Supreme Court is not supported by the decisions of this Court. It seriously undermines the limitations on civil immunity that the U.S. Supreme Court has previously crafted.

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[1] *See infra*, note 10, for an explanation of the discovery rule.

Moreover, certiorari should be granted to clarify the extent to which states may treat similarly situated persons differently under the Fourteenth Amendment's mandate of equal protection. The Wisconsin Supreme Court has ruled that victims of sexual abuse by church clerics are not entitled to the same protections afforded to victims of abuse by a parent. This distinction arbitrarily and unreasonably provides for the disparate treatment of similarly situated individuals. In maintaining such artificial distinctions, the opinion below has contravened the previous language of this Court.

Finally, this Court should grant certiorari to resolve a question of due process. Specifically, the Wisconsin Supreme Court determined that Petitioner, as a sexual assault victim, knew all of the elements of her cause of action against the Archdiocese at the time Petitioner's relationship with Father Donovan ended. As a result, the court found that Petitioner's claims had lapsed under the statute of limitations. However, Petitioner had alleged in her complaint that she was unaware of the existence, cause and nature of her injuries. Petitioner also argued to the Wisconsin Supreme Court that she could not have had her cause of action against the Archdiocese accrue until she learned of the Archdiocese's role in causing her injuries. Petitioner therefore contends that the majority's dismissal fails to comport with the due process clause of the Fourteenth Amendment, since she was unaware of the existence, cause and nature of her injuries, as well as the Archdiocese's role in causing her harm.

I.

THE OPINION BELOW FAILED TO PROPERLY INTERPRET AND APPLY FEDERAL CONSTITUTIONAL LAW WITH REGARD TO THE FIRST AMENDMENT ISSUE.

A. The Wisconsin Supreme Court erred in finding that the First Amendment shields religious organizations from civil liability for the tortious acts of employees.

The *Pritzlaff* court's effort to unduly restrict the liability of a religious organization is based upon the doctrine of judicial abstention under the Free Exercise Clause of the First Amendment of the United States Constitution. U.S. Const. amend. I. The First Amendment embraces two concepts: freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. "Conduct remains subject to regulation for the protection of society." *Cantwell v. State of Connecticut*, 310 U.S. 296, 304 (1940). As this Court recently noted:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition . . . We first had occasion to assert that principle in *Reynolds v. United States*, 98 U.S. 145 (1879), where we rejected the claim that criminal laws applied against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said "are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious beliefs superior to the law of the land, and in effect to permit every citizen to become a law unto himself." (citation omitted).

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 878-79 (1990).

The First Amendment analysis under the circumstances of this case must start with the basic and universal premise that religious organizations are liable for their torts. *Rayburn v. General Conference of Seventh Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986), *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993), *Erickson v. Christianson*, 781 P.2d 383 (Or. App. 1989). In order to raise a valid First Amendment defense, a party must set forth religious conduct which is in jeopardy. In essence, the party must show the existence of a sincerely-held religious belief with regard to the matter. *Abington School District v. Schempp*, 374 U.S. 203 (1963). The Archdiocese does not and cannot claim that sexual contact between a priest and parishioner is mandated, authorized or supported by church law. Indeed, the Archdiocese cannot convert its negligent and reckless acts into "religious conduct." Consequently, the Wisconsin Supreme Court erred in concluding that the First Amendment provides civil immunity to the Archdiocese for the tortious acts of employees.

B. The Wisconsin Supreme Court improperly expanded the doctrine of judicial abstention beyond the dictates of the U.S. Supreme Court.

The Wisconsin Supreme Court attempted to confer immunity to the Archdiocese under the limited doctrine of judicial abstention. The function of this doctrine was recently explained by this Court, stating that the government may not "lend its power to one or the other side in controversies over religious authority or dogma[.]" *Smith*, 494 U.S. at 87. While the U.S. Supreme Court has established that the free exercise clause of the First Amendment does limit judicial review of certain church hierarchy decisions involving purely internal disputes, this Court has never extended the doctrine of judicial abstention beyond internal

church disputes involving purely religious issues. Nor is such an extension of the doctrine warranted by the constitutional principles enunciated by this Court.

Pritzlaff concluded that the First Amendment of the United States Constitution:

> Prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices.

Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 790 (Wis. 1995). The Wisconsin Supreme Court then held that claims of negligent hiring and retention are barred and "the torts of negligent training or supervision cannot be successfully asserted[.]" *Id.* at 791.

It is troubling that in reaching its First Amendment decision, the *Pritzlaff* court relied almost exclusively on a law review article.[2] Perhaps because of this reliance, the court

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[2] It is obvious that the supreme court's decision in *Pritzlaff* was colored largely by the vocation and status of the defendants in that case. One wonders why the supreme court gratuitously and irrelevantly notes that "the vast majority of priests and ministers of all religions lead responsible lifestyles above reproach." *Pritzlaff*, 533 N.W.2d at 786 n.3 (quoting James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 St. Thomas L. Rev. 31, 37 (1994)). While no one disputes the court's statement regarding other priests and ministers, it must also be pointed out that the best authorities estimate that approximately 6.5% of American priests engage in sexual misconduct with youth. A.W. Richard Sipe, Sex, Priests and Power, Anatomy of a Crisis 21 (Brunner/Mazel, Inc. 1995). Father Thomas Doyle, a canon lawyer and former canonist to the Papal Pro-Nuncio in Washington, D.C. estimates that approximately 3,000 American priests are inclined toward sexual molestation of minors. Jason Berry, Lead Us Not Into Temptation, Catholic Priests and the Sexual Abuse of Children XX (Prologue) (Doubleday 1992). Further, experts estimate

(continued...)

advanced the doctrine of judicial abstention far beyond the strict limits of that doctrine set by the U.S. Supreme Court. All of the cases cited in *Pritzlaff* by the Wisconsin Supreme Court involved internal religious disputes between factions of the church or personnel disputes between a church and its cleric/employee. These judicial abstention cases have been disputes involving purely ecclesiastical issues, where the parties have impliedly consented to be bound by church law on the issue, and where the church decisions and actions were not based upon religious doctrine or tenets that violate the laws of morality or property and which do not infringe upon personal rights. *Pritzlaff* improperly attempts to expand the limited doctrine of judicial abstention to cases involving secular harm to a third party. That expansion of the doctrine is not only unwarranted based

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[2] (...continued)

that at any given time since 1989, three dozen priests and brothers are incarcerated for sexual abuse and, for example, in September 1994, 60 priests were in prison for these offenses. Sipe at 26.

It is also jurisprudentially unfortunate that the court chose to cite absolutely unsupported and self-serving statements for the proposition that "a substantial percentage of allegations of clergy sexual abuse which do receive investigation prove later to be retracted or impossible to prove." *Pritzlaff*, 533 N.W.2d at 786 (citing O'Reilly & Strasser at 37). The law review article relied upon by the court for this statement cites as its authority, a statement written by one priest, glorifying the priesthood in a magazine article, and a statement by the church's primary insurer, given at a seminar presentation. Neither of these statements are supported by any evidence, and neither are given under oath. While one cannot know what is meant by "a substantial percentage," practitioners in the area would argue that in the vast majority of cases, either the offending priest admits to the abuse, the abuse is corroborated by church records establishing that the priest suffers this psycho-sexual malady, or other victims come forward to testify that they were molested by this priest in a substantially similar manner.

upon the constitutional principles enunciated by this Court, it is directly contrary to *General Counsel of Finance and Administration v. California Superior Court of San Diego*, 439 U.S. 1369 (1978) (J. Rehnquist) (The doctrine of judicial abstention does not apply "to purely secular disputes between third parties and a particular defendant, albeit a religiously affiliated organization.").

In reaching its decision, the *Pritzlaff* court relied upon selected quotes taken from "nearly a century of United States jurisprudence." *Pritzlaff*, 533 N.W.2d at 790. However, selected quotations from a century of Supreme Court cases, especially when taken out of context, may be employed to support virtually any purported constitutional claim. The *Pritzlaff* decision illustrates the danger inherent in the practice of removing a quote from its context. Only through such a practice can one arrive at the notion that the First Amendment of the United States Constitution grants all churches immunity from liability for the secular harm resulting from their reckless indifference to its clergy sexually abusing parishioners.

In order to properly understand the constitutional limitations placed upon courts, the history of the judicial abstention doctrine must be examined. This doctrine was first espoused by this Court in *Watson v. Jones*, 13 Wall. 679 (1871).[3] That case involved a dispute between the general assembly of the presbyterian church and the local church over possession of church property. This Court re-

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[3] *Watson* was decided before the First Amendment was made applicable to actions by the state under the Fourteenth Amendment. Therefore, it was not decided based upon the First Amendment. *Presbyterian Church v. Hull Church*, 393 U.S. 440, 445 n.4 (1969). Indeed, the pronouncements of the *Watson* court were not constitutionally based, and applied with equal vigor to all private voluntary associations. *Watson*, 13 Wall. at 714.

fused to interfere with the decision of the hierarchical church under the following reasoning:

> All who unite themselves to [a religious organization] do so with an *implied consent* to [the church's] government and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of religious bodies if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is the essence of these religious unions, and of their right to establish tribunals for the decision of *questions arising among themselves* that those decisions should be binding in all cases of ecclesiastical cognizance.

Id. at 728-29 (emphasis added). Thus, under *Watson*, civil courts may not interfere with the decisions of the church regarding *purely ecclesiastical disputes* among parties who have *impliedly consented* to the jurisdiction of the hierarchical church.

The U.S. Supreme Court later reaffirmed the doctrine of limited judicial abstention in *Gonzales v. Roman Catholic Archbishop of Manilla*, 280 U.S. 1 (1929). In *Gonzales*, this Court was asked to overturn the Bishop of Manila's decision to not ordain a boy as chaplain pursuant to the terms of a trust. Because the terms of the trust were expressly governed by and were to be interpreted by ecclesiastical, not civil law, the U.S. Supreme Court refused to accept jurisdiction over this issue. Relying on *Watson*, the Court held that "[i]n the absence of fraud, collusion, or arbitrariness, the decision of the proper church tribunal *on matters purely ecclesiastical*, although effecting civil rights, are accepted in litigation before the secular courts as conclusive, *because the parties in interest made them so by contract or otherwise*." *Id.* at 16 (emphasis added). Similar to *Watson*, the U.S. Supreme Court in *Gonzales* limited judicial abstention to cases involving:

(1) Internal disputes involving parties who have impliedly or otherwise consented to the jurisdiction and ultimate authority of the hierarchical church; and

(2) Decisions of the church tribunal on purely ecclesiastical issues.

Id.

Later, in *Kedroff v. St. Nichols Cathedral*, 344 U.S. 94 (1952), the U.S. Supreme Court faced a dispute between the Soviet and North American branches of the Russian Orthodox Church regarding legal title and possession of the New York Cathedral. This Court relied upon *Watson* and *Gonzales* to hold that since the authority to determine this issue was firmly vested in the church hierarchy, under church law, the state could not intercede under the First Amendment. *Id.* at 116. However, *Kedroff* again indicated that this doctrine of judicial abstention was limited to:

(1) Determinations of "purely ecclesiastical issues." *Id.* at 115;

(2) Where the parties have impliedly consented to be bound by church law on the issues. *Id.* at 114-15;

(3) Where the hierarchical church did not engage in improper methods of determining the issues (i.e., the decision was not arbitrary or based upon fraud or collusion) *Id.* at 116; and

(4) The decision was not based upon religious doctrine or tenets that "violate the laws of morality or property, and which do[] not infringe upon personal rights[.]" *Id.* at 114. ("Legislative power to punish subversive action cannot be doubted. If such action should be actually attempted by a cleric, neither his robe nor his pulpit would be a defense.") *Id.* at 109.

Thus, under *Kedroff*, the doctrine of judicial abstention remained limited to intra-organizational disputes involving purely ecclesiastical issues. The doctrine specifically did not apply to actions by the church that are violative of individual rights based upon the civil law.

This Court again considered the civil court's jurisdiction to decide religious disputes in *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1968). *Presbyterian* involved a dispute between two local churches and the national Presbyterian church. The local churches seceded from the national church. The national church then attempted to take over the local church's property. Rather than appealing the decision to church tribunals, the local church sued in civil court in Georgia under a Georgia statute that provided that if the national church substantially departed from its tenets of faith and practice, the property would remain in the possession of the seceding local churches. Following a jury verdict in favor of the local churches, the national church appealed, claiming that consideration of this issue was violative of the First Amendment. This Court noted that special problems arise when disputes implicate controversies over church doctrine and practices. *Id.* at 445. Relying on the principles set forth in *Watson*, *Gonzales* and *Kedroff*, the Court concluded that the Georgia statute was constitutionally infirmed because it would require the civil court to interpret a particular church's doctrine and the importance of that doctrine to the religion. *Id.* at 450. Once again, the U.S. Supreme Court applied the doctrine of judicial abstention to an intra-church dispute between factions of a particular church, involving "purely ecclesiastical concern[s]," (*Id.* at 449), where the civil court would be required to interpret and resolve matters of church doctrine. But the U.S. Supreme Court reaffirmed that absent these factors, judicial abstention is not appropriate. *Presbyterian* reaffirmed that civil courts are a proper tribunal for resolving internal church property disputes. *Id.* at 445. This is particularly appropriate when the dispute may be resolved by "neutral

principles" of civil law. *Id.* at 449.[4]

The limited nature of the judicial abstention doctrine was again emphasized by this Court in *Maryland and Virginia Eldership v. Sharpsburg, Inc.*, 396 U.S. 367 (1970). *Sharpsburg* involved a dispute between the regional church and local churches in which the U.S. Supreme Court was asked to determine which of two factions should control local churches and their property and corporations. The regional church appealed the Maryland Court's decision in favor of the local churches, claiming that this decision was violative of the First Amendment. In essence, the regional church attempted to invoke the judicial abstention doctrine. This Court refused to apply the doctrine because resolution of this dispute was based upon "the language in the deeds conveying the properties in question to the local church corporations, upon the terms of the charters of the corporations, and upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property." *Id.* at 367 (citation omitted). Consequently, since the Maryland court's resolution of the dispute "involved no inquiry into religious doctrine," the judicial abstention doctrine did not apply. *Id.* at 368.

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[4] *See also Jones v. Wolf*, 443 U.S. 604 (1979), in which this Court stated:

> The neutral principles approach cannot be said to "inhibit" the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, *hire employees*, or purchase goods. . .
>
> We cannot agree, however that the First Amendment requires the states to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved.

Id. at 605-06 (emphasis added).

The doctrine of limited judicial abstention was recently applied by this Court in *Serbian Eastern Orthodox v. Milivojevich*, 426 U.S. 713 (1976). That case again involved an internal dispute, this time between the international "mother" church and the American-Canadian Diocese of the Serbian Orthodox Church, concerning whether the mother church had the power to defrock the local bishop. Consistent with *Kedroff*, the Illinois Supreme Court determined that while this was a matter of ecclesiastical government and polity, the mother church's decision could be overturned because it was "arbitrary." The *Serbian* Court, based upon *Watson*, *Gonzales* and *Kedroff*, applied the judicial abstention doctrine. *Serbian* further indicated that civil courts could not inquire into whether the hierarchical church's decision was "arbitrary", contrary to the *Kedroff* decision, since that inquiry would itself involve interpretation of church law in violation of the First Amendment. The *Serbian* Court thus affirmed that:

> The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues and dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes.
>
> . . .
>
> In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for *internal discipline and government*, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide *disputes over the government and direction of subordinate bodies*, the Constitution requires that civil courts accept their decisions as binding upon them.

Id. at 708, 724-25 (emphasis added).

Review of the historic development of the judicial abstention doctrine, and the principles elucidated by this Court in developing that doctrine, indicates that church bodies are free to establish and apply their own rules for church governance and resolution of internal disputes, and the church's decision on those issues are binding on members of that organization. Civil courts may still properly resolve even these disputes, but may not do so by "resolution by civil courts of controversies on a religious doctrine or practice." *Presbyterian*, 393 U.S. at 449. Judicial abstention has never been extended to situations, such as this case, that:

(1) Do not involve a dispute between internal factions of the church, requiring the court to side with one branch of the church over another;

(2) Do not involve disputes between parties who have impliedly consented to be bound by the law of the church on the issue;

(3) Do not require the court to resolve controversies over what is or is not the church's religious doctrine; *or*

(4) Involve church action which results in secular harm to a third party.

The Wisconsin Supreme Court suggests in *Pritzlaff* that the doctrine of judicial abstention should be extended to cases involving a dispute between the church and a third party who has not consented to the authority of the church hierarchy to resolve her dispute. However, Petitioner here has never submitted to the authority of the Archdiocese or canon law in general in resolving this issue, nor does she make any demand under church law. Rather, Petitioner is an independent third party seeking to impose civil liability upon the Archdiocese under the common law for the secular harm resulting from its negligent and reckless conduct. Petitioner has not asked that a court resolve any disputes over church law between competing factions of the church. This Court is simply asked to apply civil law to this reli-

gious corporation, like any corporation, to hold it civilly liable for the secular harm caused by its conduct.

The fundamental constitutional principles invoked in applying the doctrine of judicial abstention simply do not apply in this case. Moreover, extension of the doctrine to this type of a case was expressly rejected in *General Council of Finance and Administration v. Superior Court of California*, 438 U.S. 1369 (1978). In that decision, Justice Rehnquist reviewed the Methodist Church's application for a stay of proceedings pending certiorari in a tort claim brought by retirement home residents. Citing the intra-church line of cases involving purely ecclesiastical decisions, (the very line of cases relied upon by *Pritzlaff*) the Methodist Church claimed that the California Supreme Court had impermissibly determined personal jurisdiction over the church by "independently examining, and making the ultimate decision regarding the structures and actual operations of the hierarchical church and its constituent units in violation of the First and Fourteenth Amendments." Justice Rehnquist rejected this "judicial abstention" argument by distinguishing the internal dispute cases as follows:

> There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating *intra-church disputes*. . . . But this Court has never suggested that those constraints similarly apply outside the context of such intra-organizational disputes. Thus, *Serbian Eastern Orthodox Diocese* and the other cases cited by the Appellant are not on point. Those cases are premised on the perceived danger that in resolving intra-church disputes, the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. (citation omitted). Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, *albeit a religious affili-*

> *ated organization*, in which fraud, breach of contract, and statutory violations are alleged.

Id. at 1372-73. (emphasis added). Like *General Assembly*, this case does not involve an intra-organizational dispute. Like *General Assembly*, this case does not require the Court to "become entangled in essentially religious controversies." Like *General Assembly*, this case does not require the Court to "intervene on behalf of groups espousing particular doctrinal beliefs." Like *General Assembly*, this case simply requires the Court to apply neutral principles of civil law to purely secular disputes between a third party and a religious affiliated defendant. The judicial abstention doctrine simply does not apply in this case.[5]

C. Imposing civil liability on religious organizations for negligent retention and supervision of clergy does not violate the establishment clause.

To the extent *Pritzlaff* may be based upon the establishment clause of the First Amendment, that constitutional claim is also infirmed.

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[5] *See Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993) (parishioner's claim against the Episcopal Diocese for negligent hiring and supervision resulting in priest's sexual relationship with parishioner was not barred by the First Amendment since the claims did not involve disputes within the church, because the court did not interpret or weigh church doctrine and because neutral principles of law can be applied); *Molko v. Holy Spirit Association*, 762 P.2d 46 (Cal. 1988) (church may be held liable for deceptive recruitment practices because the marginal burden on the church's free exercise of religion is justified by the compelling state interest in protecting individuals and families); *Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991); *Neiman v. Cooley*, 637 N.E.2d 943 (Ohio Ct. App. 1994); *Mrozka v. Archdiocese of St. Paul and Minneapolis*, 482 N.W.2d 806 (Minn. Ct. App. 1992); *Hutchinson v. Luddy*, 606 A.2d 905 (Pa. Super. 1992); *Erickson v. Christianson*, 781 P.2d 383 (Or. App. 1989).

State action does not violate the establishment clause if such action:

(1) Has a secular purpose;

(2) Has a primary effect which neither advances nor inhibits religion; and

(3) Does not foster excessive entanglement with religion.

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The first two prongs of this test are not even arguably implicated in this case. At issue here is universal application of common law negligence. This application has a secular purpose, and its primary effect neither advances nor inhibits religious conduct. Rather, *Pritzlaff* merely involves application of the civil common law to church employers in conformity with neutral principles of law previously sanctioned by this Court. *See Jones*, 443 U.S. at 605-06; *see also Molko*, 762 P.2d at 61.

Nor does this case involve "excessive entanglement" with religion. The *Lemon* Court was concerned that state action may result in administrative and political entanglement. Administrative entanglement typically involves comprehensive, discriminating and continual state surveillance of religion. *Lemon*, 403 U.S. at 619-22. Of particular concern is the danger that government action may "have self-perpetuating and self-expanding propensities." *Id.* at 624. This generally occurs when the state grants regulated aid to groups affiliated with religious institutions, thus requiring ongoing monitoring. *See, e.g., Vernon v. City of Los Angeles*, 27 F.3d 1385, 1400-01 (9th Cir. 1994). *Pritzlaff*, however, involves a single inquiry under the neutral principles of law into whether the church negligently employed a single priest. There is not the threat or necessity of the government's ongoing monitoring of the church's employment decisions. Thus, no excessive entanglement is at issue. *Id. See also NLRB v. Hanna Boys Center*, 940 F.2d 1295, 1304 (9th Cir.

1991) (finding no entanglement where the national labor relation's board jurisdiction over a church-owned school required government involvement only with respect to specific claims filed on behalf of specific employees); *United States v. Freedom Church*, 613 F.2d 316 (1st Cir. 1979).

The second potential political entanglement recognized by *Lemon* involved the potential for political divisiveness resulting from government action which divides citizens along political lines. The threat of political divisiveness has never alone been grounds for a court to find a violation of the establishment clause. *Vernon*, 27 F.3d at 1401. Moreover, there is simply no evidence that political divisiveness would occur in this case, since this Court is merely asked to treat the church like any other employer. Therefore, application of the three pronged test established in *Lemon* reveals that this case does not involve a violation of the establishment clause of the First Amendment.

D. The basis and rationale for the *Pritzlaff* court's decision is infirmed.

The decision in *Pritzlaff* was based upon the proposition that Petitioner's negligence claims would improperly require that a court determine "what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices." *Pritzlaff*, 533 N.W.2d at 790.

In this case, however, no such inquiry is required. This Court is not asked to "determine what makes one competent to serve as a Catholic priest." Nor is this Court asked to interpret church canons, church policies or church practices. The Archdiocese's rights under church canons, policies and practices to place Father Donovan wherever it wants to are not in dispute. It is free to conduct the internal government of the church in any manner it so chooses. And the

church decisions are binding on all within the church who make claims under church law.[6] However, the church's authority to govern the church as it sees it is one thing; immunity for secular harm to third parties based upon these decisions is quite another. Like any other corporation, if the church's negligent conduct results in secular harm, it is liable for that secular harm under application of neutral principles of secular law. A fundamental principle of the First Amendment is that churches remain liable for their secular torts and even arguably religious conduct remains subject to regulation by the civil courts for the protection of society. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

The Wisconsin Supreme Court's rationale for application of this rule is similarly infirmed. Citing a law review article, the *Pritzlaff* court determined that church employers cannot be found negligent because "negligence requires the court to create a 'reasonable bishop' norm." *Pritzlaff*, 533 N.W.2d at 790 (citing O'Reilly & Strasser at 47). That claim is simply untenable. When a bishop's placement decision results in secular harm to a third party, the bishop, like any other employer, is subject to the civil law. The standard for negligent retention and supervision claims is a civil law standard that does not require the court to interpret or apply religious law or dogma. This case involves inquiry into whether the bishop acted as a "ordinary prudent person" in making this decision, not whether he acted as a "reasonable bishop." *Peters v. Holiday Inn, Inc.*, 278 N.W.2d

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[6] Arguably, for example, if Father Donovan disputed his placement by the Archdiocese at a particular establishment, he could not bring that dispute to a civil court. That issue directly involves the church's authority to decide matters of internal governance free of civil court interference. Because Father Donovan's claim of entitlement would rest on canon law and because he has impliedly consented to the church's authority on the issue, the civil court may not interfere.

208 (Wis. 1979). His conduct, like any other employer's conduct, is to be measured based upon the "reasonable person" standard. As with any corporation, compliance with industry standards does not create immunity in tort.[7] Thus, whether a defendant acted in conformity with the standard set by other bishops is not determinative, and this Court need not establish a "reasonable bishop" standard. The bishop is free to let "beliefs in penance, admonition and reconciliation as a sacramental response to sin" influence or control employment decisions within the internal governance of the church. *Pritzlaff*, 533 N.W.2d at 790 (citing O'Reilly & Strasser at 47). However, if this decision does not meet the standard of a "reasonable person," the bishop employer, like any other employer, remains liable for the resulting secular harm.

Further, the law review article relied upon in *Pritzlaff* questions:

> If negligent selection of a potential pedophile for the religious office of priest, minister, or rabbi is a tort as to future child victims, will civil courts also hear Title VII challenges by the non-selected seminarian against the theological seminary that declines to ordain a plaintiff into ministry because of his psychological profile? How far shall the court's qualitative entanglement with religious selectivity extend?

Id. (citing O'Reilly & Strasser at 47). The answer to this question is quite well established under the constitutional principles elucidated by the U.S. Supreme Court. The seminarian in the cited example:

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[7] "One of the best known principles of law . . . is that compliance with [industry] custom is no defense to a tort claim." *Rodi Yachts, Inc. v. National Marine, Inc.*, 984 F.2d 880 (7th Cir. 1993).

(a) Seeks appointment based upon church law;

(b) Has impliedly consented to the authority of the church in making this ecclesiastical appointment;

(c) The employment is based upon the dispute over qualifications based truly upon religious doctrine; and

(d) The church decision does not result in secular harm to a third party.

Thus, the doctrine of judicial abstention will likely apply to the seminarian's case, since it is a matter of internal church governance. *See Gonzales v. Roman Catholic Archbishop of Manilla*, 280 U.S. 1 (1929). None of these factors apply here.

The Wisconsin Supreme Court finally relies upon selected quotations from the U.S. Supreme Court to support the proposition that "Freedom to select the clergy . . . must now be said to have federal constitutional protection as part of the free exercise of religion against state interference." *Pritzlaff*, 533 N.W.2d at 790 (quoting *Kedroff*, 344 U.S. at 116). The *Pritzlaff* court's analysis illustrates the danger inherent in removing a select quotation from its context.[8] As

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[8] The quote in *Pritzlaff*, put in its proper context, is as follows:

> The [*Watson*] opinion radiates, however, a spirit of freedom for religious organizations, and independence from secular control or manipulation - in short, power to decide for themselves, free from state interference, *matters of church government as well as those of faith and doctrine*. Freedom to select the clergy, *where no improper methods of choice are proven*, we think, must now be said to have federal constitutional protection as part of the free exercise of religion against state interference.

Kedroff, 344 U.S. at 116. (emphasis added).

The thrust of the quoted language is that the judicial abstention doctrine, previously set forth in *Watson*, was for the first time in *Kedroff* to be based on the First Amendment constitutional protections. Moreover, and conspicuously absent from the cita-

(continued...)

set forth herein, the cases relied upon by *Pritzlaff*, (i.e., *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), *Gonzales v. Roman Catholic Archbishop of Manilla*, 280 U.S. 1 (1929), *Rayburn v. General Conference of Seventh Day Adventists*, 722 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986), *Olston v. Hallock*, 201 N.W.2d 35 (Wis. 1972), *Black v. St. Bernadette's Congregation*, 369 N.W.2d 550 (Wis. Ct. App. 1984)), all involve internal disputes with claims made under and governed by church law. Each of these cases involve a claim by a cleric to entitlement of a position within the church government, the resolution of which would require a court to inquire into religious disputes and impose upon the internal church body the state's preference as to whom is qualified to serve as a cleric. These factors fall squarely within the limited judicial abstention doctrine applied by the U.S. Supreme Court. However, none of those factors apply in this case, which involves a claim by a secular third party that is governed by the civil law. Petitioner here does not make any claim under church law. Petitioner here does not claim that she is competent and entitled to serve in a position within the internal church government. The cases are utterly distinguishable. While the church is free to determine who is competent and qualified to be a priest, and that decision is binding upon the party seeking such appointment under church law governance, if the church's appointment results in secular harm to a third party, the church is liable.

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[8] (...continued)

tion in *Pritzlaff*, the *Kedroff* court limited the church's freedom to select clergy free from state interference to those cases "where no improper methods of choice are proven." Finally, the quotation from *Kedroff* in its proper context, is in full conformity with the Court's decisions in *Watson*, *Gonzales* and the other cases cited herein and does not create a universal expansion of judicial abstention in all cases involving the church's choice of clergy.

E. The *Pritzlaff* decision contravenes federal constitutional law by failing to provide a logical stopping point to a church's civil and criminal immunity for the secular harm inflicted on a third party.

Courts have long held that religious organizations are not immune from civil and criminal liability. *Cantwell v. Connecticut*, 310 U.S. 296 (1940), *Erickson v. Christianson*, 791 P.2d 383 (Or. App. 1989), *Mrozka v. Archdiocese of St. Paul and Minneapolis*, 482 N.W.2d 806 (Minn. Ct. App. 1992), *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986), *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993). Yet there is no logical end to the civil (and presumably criminal) amnesty granted by the ill-conceived *Pritzlaff* decision. For example, if a bishop tells an obviously intoxicated priest to deliver documents to a parish, places the priest in the car, starts the car, shifts the car to drive and shortly thereafter the car hits and kills a child on the sidewalk, under *Pritzlaff* would the bishop be immune from civil court interference with this religious employment decision? Would a religious superior, who as a purported fundamental tenet of his religion, ordered a priest to sacrifice a human being be immune from criminal or civil liability? Would a bishop, who, after contracting with an electrician or plumber to perform repairs on the chancery, decides that payment for the bill is not authorized under church law be immune from a breach of contract claim? Could anyone under the guise of religion engage in virtually any acts with civil and criminal impunity simply by clothing those acts under the garb of "religion?" These very types of issues have been considered and the First Amendment immunity claims have been rejected by the U.S. Supreme Court in uniformally concluding that the free exercise clause was never intended to prohibit state action for the punishment of acts inimical to the peace, good order and morals of soci-

ety.[9] Obviously, if the civil court is without jurisdiction, the state cannot carry out its public duty. That is precisely why the limitations of the judicial abstention rule are necessary.

II.

THE OPINION BELOW DENIED PETITIONER EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT.

Under the U.S. Constitution, the Fourteenth Amendment protects the citizenry from state action which results in a deprivation of equal protection. U.S. Const. amend. XIV. According to this Court, the equal protection clause means that the rights of all persons must rest upon the same rule in similar circumstances. *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32 (1928). No greater burdens are to be laid upon one individual than are laid upon others in the same condition. *Bell's G.R. Co. v. Pennsylvania*, 134 U.S. 232 (1890). Application of the Fourteenth Amendment to afford proper constitutional protections will therefore turn on the peculiar circumstances of each case. *Safeway Stores, Inc. v. Oklahoma Retail Grocers Asso.*, 360 U.S. 334 (1959).

Moreover, the Fourteenth Amendment prohibits the state from engaging in arbitrary discrimination; that is, discrimination without reasonable basis. *Denver v. New York Trust Co.*, 229 U.S. 123 (1913). The prohibition on arbitrariness requires that the state's classification rest on real and not feigned differences, such that different treatments will not be so disparate, relative to the difference in classification, as to constitute arbitrary state action. *Walters v. St. Louis*, 347 U.S. 231 (1954). Consequently, the equal protection

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[9] *Davis v. Beacon*, 133 U.S. 333 (1890), *Cantwell v. Connecticut*, 310 U.S. 296 (1940), *United States v. Lee*, 455 U.S. 252 (1982), *Bob Jones University v. United States*, 461 U.S. 574 (1983).

clause dictates that courts apply justice equally to all parties. *Schilb v. Kuebel*, 404 U.S. 357 (1971).

Pursuant to these constitutional mandates, the Wisconsin Supreme Court violated Petitioner's right to equal protection of the law when it set forth an arbitrary classification designed to extinguish Petitioner's claim under Wisconsin's statute of limitations.[10] Specifically, the supreme court found that Wisconsin's discovery rule did not apply to Petitioner's claims, despite the fact that the discovery rule has previously been accepted in the context of incest cases. The "incest exception" allows a victimized plaintiff:

> to avoid a motion to dismiss on the pleadings where she alleges that she was unable to forge a connection between the abuse and her latent emotional injuries despite the exercise of reasonable diligence, even though the plaintiff does not allege that she repressed all memories of the abuse.

Pritzlaff, 533 N.W.2d at 787.

In explaining the rationale underlying the "incest exception", the supreme court explained:

> The rule focuses on the unique harms and relationships between the tortfeasor and victims which exist in cases of incest. For example, what is unfortunately a fairly typical fact scenario in incest cases was described in *Hammer*. There, the conduct occurred in secret and was

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[10] The supreme court noted that the applicable statute of limitations against the Archdiocese was three years. *Pritzlaff*, 533 N.W.2d at 784 (citing sec. 893.54, STATS.). However, Petitioner argued that Wisconsin's judicially crafted discovery rule, *Hansen v. A.H. Robins, Inc.*, 335 N.W.2d 578 (Wis. 1983), served to extend the time in which a claim could be brought. Under the discovery rule, the cause of action accrues on the date the injury was discovered or with reasonable diligence should be discovered, though not on the date of the act that resulted in the injury. *Pritzlaff*, 533 N.W.2d at 784 (citing *Hansen*, 335 N.W.2d at 583).

> accompanied by threats that harm would come to the victim if she ever told anyone about it and the victim was repeatedly told that she had caused the acts and that they were her fault. (citations omitted). Further, because of these relationships and types of factual situations, and because of the age of the victims, oftentimes victims do not realize the wrongfulness of the acts. (citation omitted). Thus, for reasons of public policy, a special discovery rule has been created for these cases in an effort to provide adequate protection to children who "have been harmed because of a 'most egregious violation of the parent/child relationship.' " (citations omitted).

Pritzlaff, 533 N.W.2d at 788.

However, in delineating the special circumstances which warrant the "incest exception," the Wisconsin Supreme Court refused to recognize that equally "unique" circumstances govern the relationship between Petitioner and Father Donovan. Arguably, the sexual assault of a plaintiff in the priest/parishioner relationship is just as egregious as parent/child incest. In both situations, tortfeasors have taken advantage of the vulnerabilities of plaintiffs to carry out acts of molestation. In both situations, plaintiffs may have difficulty recognizing the wrongfulness of the assaults because of the trust developed in the status relationship between tortfeasor and victim. The substantial similarity between the two scenarios requires that the state treat these victims equally under the law.[11] There is no rational basis from which to find that victims of incest are any more entitled to protection by the state than victims of sexual assault by parish priests. The current artificial distinctions recognized by the Wisconsin Supreme Court can amount to

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[11] Indeed, the supreme court's findings are even more difficult to understand when one considers the plight of minors who are abused by priests.

nothing more than an arbitrary classification. Consequently, this Court should find that the lower court erred in concluding that Pritzlaff was not entitled to the same protection under the discovery rule as victims of incest, and therefore denied Pritzlaff equal protection of the law under the Fourteenth Amendment.

III.

THE OPINION BELOW DENIED PETITIONER DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

Under the Fourteenth Amendment to the U.S. Constitution, guarantees of due process are designed to protect the individual against the arbitrary action of government. *Wolff v. McDonnell*, 418 U.S. 539 (1974). Such constitutional protection demands that the government not create laws that are unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained. *Nebbia v. New York*, 291 U.S. 502 (1934). This federal guaranty of due process extends to state action through its judicial branch of government. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930).

In addition, determining what constitutes due process depends on circumstances that vary with the subject matter and the necessities of the situation. *Moyer v. Peabody*, 212 U.S. 78 (1909). A balancing of relevant and conflicting factors is a necessary process. *Bartkus v. Illinois*, 359 U.S. 121 (1959).

Consistent with these principles, the Wisconsin Supreme Court erred when it concluded that the statute of limitations barred Pritzlaff's causes of action. According to the majority's reasoning, Pritzlaff's claim against the Archdiocese could not stand because she knew all of the elements of her underlying claim against Father Donovan by the

time the relationship between the two ended. *Pritzlaff*, 533 N.W.2d at 785.

However, a fundamental tenet of due process prohibits the government from requiring a person to swear to a fact that the individual cannot be expected to know. *Louisiana ex rel. Gremillion v. N.A.A.C.P.*, 366 U.S. 293 (1961). In *Pritzlaff*, the Wisconsin Supreme Court expected Pritzlaff to understand both the existence and nature of her injuries as well as the role the Archdiocese played in causing such injuries. Such reasoning is infirmed.

At the pleading stage under Wisconsin law, the supreme court was required to liberally construe the pleadings and accept the allegations as true. *Pritzlaff*, 533 N.W.2d at 784 (citing *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432 (Wis. 1994)). Pritzlaff alleged to the court that:

> As a result of the psychological distress caused by the sexual advances and the coping mechanisms which were subsequently developed . . . she has suppressed and been unable to perceive the existence, nature or cause of her psychological and emotional injuries until April, 1992.

Id. at 783. Despite Pritzlaff's allegations, the majority improperly charged her with knowledge of her psychological and emotional injuries. Such action cannot stand under due process principles.

Moreover, Pritzlaff could not properly be charged with knowledge of the Archdiocese's role in causing her injuries. In many sexual abuse cases, including the current action, Pritzlaff could not have known what the Archdiocese did, or did not do, to allow, encourage or support the assault upon her, as she has alleged, until much later, and perhaps not until the commencement of her lawsuit or thereafter during the course of discovery. Consequently, the Wisconsin Supreme Court arbitrarily expected Pritzlaff to have an

awareness of facts beyond that which is required by pleading rules in Wisconsin, and most importantly, beyond that which is required by the due process clause. The particular circumstances of this case require that the Court find that Wisconsin acted unreasonably and in violation of the Fourteenth Amendment when it extinguished Pritzlaff's causes of action under the statute of limitations.

CONCLUSION

For the foregoing reasons, the Petitioner urges this Court to issue a writ of certiorari to the Wisconsin Supreme Court to review its judgment and opinion.

Respectfully submitted,

ROBERT L. ELLIOTT, Esq.
Counsel of Record
TIMOTHY J. CESAR, Esq.
HAUSMANN-McNALLY, S.C.
633 West Wisconsin Avenue
Suite 2000
Milwaukee, Wisconsin 53203
(414) 271-5300

ROBERT S. SOSNAY, Esq.
10721 West Capitol Drive
Suite 207
Milwaukee, Wisconsin 53222
(414) 527-0100

Attorneys for Petitioner

APPENDIX

[Filed June 27, 1995]

No. 93-1846

STATE OF WISCONSIN : IN SUPREME COURT

JUDITH M. PRITZLAFF,

Plaintiff-Appellant,

v.

ARCHDIOCESE OF MILWAUKEE,

Defendant-Respondent-Petitioner,

REVEREND JOHN T. DONOVAN,

Defendant-Respondent,

ARIZONA HEALTH CARE COSTS CONTAINMENT SYSTEM AND HEALTH CARE FINANCING ADMINISTRATION,

Defendants.

Review of a decision of the court of appeals. **Reversed.**

Day, J. This is a review of a decision of the court of appeals reversing an order of the circuit court for Milwaukee County, Honorable John G. Bartholomew, presiding, that dismissed all claims against the Archdiocese of Milwaukee (Archdiocese) and the Reverend Father John Donovan (Fr. Donovan) arising out of a relationship that was alleged to have occurred between Fr. Donovan and Ms. Judith M. Pritzlaff from 1959 to 1965 for failure to state a claim upon which relief can be granted and because the claims were barred by the statute of limitations. Sec. 802.06, Stats. (1993-94). We conclude that to allow the claim to proceed against the Archdiocese based on Ms. Pritzlaff's allegation concerning Fr. Donovan despite the

passage of twenty-seven years since the end of the alleged relationship would be contrary to the public policy of the State. We also conclude that the claims of negligent hiring, retaining, training and supervision are barred by the First Amendment in this case. We therefore reverse that portion of the decision of the court of appeals which remanded the case for a trial of the negligent hiring, training and supervision claim against the Archdiocese.

Ms. Pritzlaff first filed a complaint against Fr. Donovan and the Archdiocese on November 12, 1992. The relevant allegations from her complaint are as follows:

> 4. That at all times material, defendant Donovan was a Roman Catholic priest and an agent/representative of the defendant Archdiocese.
>
> 5. That defendant Donovan first met the plaintiff while she was a high school student in the late 1950's.
>
> 6. That thereafter, while acting in his capacity as a priest, defendant Donovan used said position to develop a friend like relationship with the plaintiff.
>
> 7. That defendant Donovan continued said relationship with the plaintiff.
>
> 8. That defendant Donovan did in fact use said relationship and his position as a priest to coerce the plaintiff to have a sexual relationship with him.
>
> 9. That as a result of the actions of defendant Donovan, the plaintiff has suffered and continues to suffer from severe emotional distress, causing and contributing to the break-up of her marriage, separation from her children, loss of jobs and other difficulties.
>
> . . .
>
> 11. That at all times the defendant Archdiocese knew or should have known the type of conduct being pursued by Donovan and should have taken steps to stop same.

Five days later, on November 17, 1992, Fr. Donovan filed a motion to dismiss for failure to state a claim, asserting among other things that the claim was barred by the statute of limitations. On December 28, 1992, the Archdiocese also filed a motion to dismiss for failure to state a claim which asserted that the alleged conduct of Fr. Donovan was not tortious, that the action was barred by the statute of limitations, and that the Archdiocese was not responsible as a matter of law for the alleged conduct of Fr. Donovan.

In apparent response to the defendants' motions, on January 20, 1993, Ms. Pritzlaff filed an amended complaint. The amended complaint was divided into two causes of action. The first cause of action was against Fr. Donovan for his alleged actions. The second cause of action was against the Archdiocese and incorporated by reference all of the allegations against Fr. Donovan. The amended complaint reasserted most of the allegations made above and added the following relevant allegations:

> 9. That defendant DONOVAN did in fact use said relationship and his position as a priest to force and coerce the plaintiff to have a sexual relationship with him without her consent.
>
> 10. That Defendant DONOVAN caused Plaintiff JUDITH M. PRITZLAFF, to suffer and continues to suffer from severe emotional distress, causing and contributing to the break-up of her marriage, separation from her children and serious personal injuries, including but not limited to severe and painful psychological injuries, which injuries are permanent in nature and have caused her to incur pain, suffering, humiliation, disability, loss of earning capacity and a loss of an ability to enjoy life and expenses for medical and psychological treatment.
>
> 11. As a result of the psychological distress caused by the sexual advances and the coping mechanisms

> which were subsequently developed by JUDITH M. PRITZLAFF, she has suppressed and been unable to perceive the existence, nature or cause of her psychological and emotional injuries until approximately April, 1992.
>
> . . .
>
> 15. That upon information and belief, and at all times material hereto, the ARCHDIOCESE was responsible for the training and placement and supervision of archdiocesan priests and the assignment of those priests into archdiocesan's schools and church parishes within the Milwaukee Archdiocese.
>
> 16. The ARCHDIOCESE had a duty to admit only qualified candidates into the priesthood, properly test and screen candidates for the priesthood and priests to ascertain if such persons had an illness or sexual inclination which caused a priest to be sexually attracted to teenage girls/young women, . . . prior to placing a priest in to the community, to make appropriate placements of priest considering all relevant factors, supervise the priests which the archdiocese placed into the community, to counsel and guide priests in dealing with issues of celibacy and human sexuality and to supervise the operation of the various parishes located within the Archdiocese, including but not limited to all parishes at which DONOVAN served.
>
> . . .
>
> 20. The ARCHDIOCESE knew or should have known that DONOVAN had a sexual problem prior to 1959 and acted willfully, intentionally and in wanton and reckless disregard of the rights and safety of plaintiff by failing to remove DONOVAN from serving as a priest . . . .

On February 8, 1993 and February 26, 1993, Fr. Donovan and the Archdiocese again filed motions to dismiss for failure to state a claim. In addition to the reasons stated in their first motions to dismiss, the Archdiocese

asserted that the negligent supervision claim was inadequately pleaded and that First Amendment precluded a court from finding any liability on the part of the Archdiocese for negligent supervision. Ms. Pritzlaff did not respond to the defendants' motion to dismiss until March 31, 1993. The Archdiocese asserted that this failure to file a timely brief in opposition to the motion to dismiss was also a ground for dismissing the complaint.

On April 26, 1993, the circuit court granted the defendants' motions to dismiss. The court held that the Archdiocese was not responsible under the doctrine of respondeat superior since the alleged actions of Fr. Donovan could not have been in the scope of his employment, that there is no basis to hold the Archdiocese liable on a theory of negligence, and that the statute of limitations bars the claims both because the plaintiff failed to exercise due diligence in discovering her claim and because "to allow this action to proceed after a passage of 27 years would be fundamentally wrong and in clear violation of sound public policy." Ms. Pritzlaff appealed the circuit court order.

On August 23, 1994, the court of appeals held that the claims were not barred by the statute of limitations. It also held that the circuit court erred when it declined to recognize the claim of negligent supervision. However, the court of appeals affirmed the circuit court's conclusion that the Archdiocese was not liable on a theory of respondeat superior. The Archdiocese, but not Fr. Donovan, petitioned this court for review of the court of appeals' decision. We granted that petition for review.[1]

[1] Fr. Donovan did not petition this court for review in a timely manner. However, Ms. Pritzlaff's second cause of action incorporates by reference the allegations against Fr. Donovan and the claims against the Archdiocese are predicated on those allegations. Therefore, it is necessary for this court to discuss Ms. Pritzlaff's allegations against Fr. Donovan.

Ms. Pritzlaff did not file a cross-petition seeking review of the court of appeals decision that the Archdiocese could not be held liable on a theory of respondeat superior. That issue is therefore not before this court.

This case requires this court to review the pleadings to determine if they state a claim upon which relief can be granted. When undertaking such a review, this court liberally construes the pleadings, and accepts the allegations in the pleadings as true. *Bowen v. Lumbermens Mut. Cas. Co.*, 183 Wis. 2d 627, 635-36, 517 N.W.2d 432 (1994). Further, this court will dismiss claims for failure to state a claim upon which relief can be granted only if "it is quite clear that under no conditions can the plaintiff recover." *Id.* at 636.

A threshold question when reviewing a complaint is whether the complaint has been timely filed, because an otherwise sufficient claim will be dismissed if that claim is time barred. Sec. 802.06, Stats. (1993-94). Since we conclude that Ms. Pritzlaff's twenty-seven year old claim is time barred, we reverse that portion of the decision of the court of appeals which remanded the claim against the Archdiocese for negligent supervision.

The relevant statute of limitations for actions against the Archdiocese is three years. *See* sec. 330.205, Stats. (1963), and its successor, sec. 893.54, Stats. (1993-94). The three year period begins on the same date that the cause of action accrued against Fr. Donovan. Thus, unless the statute of limitations was tolled, Ms. Pritzlaff filed her claims well past the time allowed by statute. However, under some circumstances, public policy dictates that the date that a cause of action accrues be well after the date of the act that caused harm. Those circumstances are outlined in the judicially created "discovery rule." We as-

sume, without deciding, that the discovery rule applies to the Archdiocese.[2]

The first Wisconsin case to approve the discovery rule was *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983). In that case, the plaintiff was allegedly injured by a "Dalkon Shield" intrauterine device manufactured by the defendant and inserted into her uterus in 1974. *Id.* at 552. She began to suffer symptoms some time just prior to June 13, 1978, and sought medical care on June 16, 1978. *Id.* However, her doctor told her she was in good health and noted that she had no symptoms on that day. *Id.* The symptoms returned, and on June 26, 1978, the plaintiff went to another doctor. *Id.* at 553. That doctor removed the Dalkon Shield and correctly diagnosed her condition as pelvic inflammatory disease. *Id.* She filed suit on June 24, 1981. *Id.* This court, in rejecting the statute of limitations defense asserted by A.H. Robins, Inc.,

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[2] At least one court has declared that the statute of limitations will not be extended against an employer based on the discovery rule. That court stated:

> It is one thing to extend a statute of limitations to the individual primarily responsible for the plaintiff's injuries, and another to apply an open-ended period of limitations to the employer of the assailant. To allow lawsuits based on an employer's negligence in hiring, training and retaining an employee years after the abuse is alleged to have occurred, and, in many cases, years after the assailant's employment has ended, would, we believe, have serious economic repercussions which would stifle business growth.
>
> More importantly, it would deny such defendants a meaningful opportunity to defend against such accusations.

Debbie Reynolds Prof. Rehearsal Studios v. Superior Court, 25 Cal. App. 4th 222, 233 (1994). However, other courts have assumed that the discovery rule also applies to the employer. *Doe v. Coffee County Bd. of Educ.*, 852 S.W.2d 899, 908 (Tenn. App., 1992); *Callahan v. State*, 464 N.W.2d 268, 273 (Iowa, 1990).

held that the cause of action accrued on the date the injury was discovered or with reasonable diligence should be discovered, not on the date of the act that resulted in the injury. *Id.* at 560. Therefore, since the plaintiff discovered the injury on June 26, 1978 and commenced her action on June 24, 1981, the action was not barred by the three year statute of limitations. *Id.* at 561.

Three years later, this court expanded the scope of the discovery rule in *Borello v. U.S. Oil Co.*, 130 Wis. 2d 397, 388 N.W.2d 140 (1986). There, the defendant installed a furnace in the plaintiff's home in December 1977. *Id.* at 400. On December 29, 1977, the plaintiff complained to the defendant in a letter that her previous furnace problems were worse with the new furnace and also complained of an odor from the furnace, respiratory problems and headaches. *Id.* She consulted three physicians, all of whom told her that her complaints could not, with any degree of certainty, be attributed to the furnace. *Id.* at 401. She was hospitalized on February 5, 1979. *Id.* at 401-02. When she returned to her home on February 20, 1979, she found flat surfaces covered with a red dust. *Id.* at 402 She asserted that she then knew that the furnace was the cause of her illness. *Id.* However, on March 12, 1979, she consulted another doctor who said he did not believe that her symptoms were related to the furnace. *Id.* Finally, in October 1979, she consulted an occupational medicine specialist who concluded that her symptoms were a result of metal fume fever caused by the furnace. *Id.* at 402-03. She filed her complaint in November 1981. *Id.* at 403. "Accordingly, we are confronted by a situation where a complainant was injured more than three years before the filing of the complaint and almost contemporaneously with that injury formed her own layperson's subjective opinion that the furnace was the cause. Yet at every turn,

she was told by professionals, . . . that the furnace fume problem was irrelevant." *Id.* at 403-04. "A person who has used reasonable diligence to secure medical advice should be given the protection of one who is 'blamelessly ignorant.' " *Id.* at 414. This court held that "cause of action does not accrue until the nature of the injury *and* the cause—or at least a relationship between the event and the injury—is or ought to have been known to the claimant." *Id.* at 406-07.

Ms. Pritzlaff argues that her claim is saved by the discovery rule because "she has suppressed and been unable to perceive the existence, nature or cause of her psychological and emotional injuries until approximately April, 1992." Therefore, she argues that her suit, commenced November 12, 1992, is timely.

We conclude that Ms. Pritzlaff's claim does not qualify for the tolling of the statute of limitations provided by the discovery rule because Ms. Pritzlaff knew of all of the elements of her underlying claim against Fr. Donovan, at the latest, by the time the relationship between the two ended.

It is well settled that a cause of action accrues when there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it. *Meracle v. Children's Serv. Socy.*, 149 Wis. 2d 19, 437 N.W.2d 532 (1989); *Barry v. Minahan*, 127 Wis. 570, 573, 107 N.W. 488 (1906). A party has a present right to enforce a claim when the plaintiff has suffered actual damage, defined as harm that has already occurred or is reasonably certain to occur in the future. *Hennekens v. Hoerl*, 160 Wis. 2d 144, 152, 465 N.W.2d 812 (1991). The discovery rule does not change these basic propositions, it simply defines some of the elements. That

is, the discovery rule is so named because it tolls the statute of limitations until the plaintiff discovers or with reasonable diligence should have discovered that he or she has suffered actual damage due to wrongs committed by a particular, identified person. Until that time, plaintiffs are not capable of enforcing their claims either because they do not know that they have been wronged, *see Hansen*, 113 Wis. 2d at 550, or because they do not know the identify of the person who has wronged them, *see Borello*, 130 Wis. 2d at 406-07. Accordingly, " '[d]iscovery' in most cases is implicit in the circumstances immediately surrounding the original misconduct." *Borello*, 130 Wis. 2d at 404-05 n.2.

Given this understanding of the discovery rule, we conclude that the rule does not save Ms. Pritzlaff's claim. At oral argument, counsel for Ms. Pritzlaff admitted that the following statement, taken from the Archdiocese brief, was a correct statement of Ms. Pritzlaff's claim:

> [T]he plaintiff has claimed that despite the awareness of the tortfeasor and the alleged tortious acts, despite this awareness, she was unable to connect her knowledge of the acts with her emotional harm, that it wasn't until '92 that she connected her psychological, emotional difficulties.

Taking this allegation as true,[3] as we must for the purposes of this case, Ms. Pritzlaff still does not prevail. Ms.

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[3] "[I]t must be noted that the vast majority of priests and ministers of all religions lead responsible lifestyles above reproach. And a substantial percentage of allegations of clergy sexual abuse which do receive investigation, prove later to be retracted or impossible to prove. This has been the experience of the largest insuror of churches." James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 St. Thomas L. Rev. 31, 37 (1994) (footnotes omitted).

Pritzlaff, by her own admission, knew the identity of the tortfeasor and the conduct by the tortfeasor. Further, she claims that the sexual relationship was "without her consent" and was a result of "force and coerc[ion]." Of course, she must allege this as fact because a consensual sexual relationship between two adults is no longer actionable in Wisconsin. *See* Sec. 768.01, Stats.;[4] *Koestler v. Pollard*, 162 Wis. 2d 797, 802-04, 471 N.W.2d 7 (1991) (abolition of claims under sec. 768.01, Stats. evinces a legislative intent that "dictates that courts should not administer heart balm in the form of civil liability"). However, if in fact the sexual acts were a product of "force and coerc[ion]", then the contact was immediately actionable as either a civil battery or an offensive bodily contact. *See* Wis. JI-Civil 2005; Wis. JI-Civil 2010 (approved 1960); *see also Marsha V. v. Gardner*, 231 Cal. App. 3d 265, 272-73 (Cal. App. 1991); *Doe v. R.D.*, 417 S.E.2d 541, 542 (S.C. 1992). Therefore, assuming her allegations are true, Ms. Pritzlaff could have alleged a complete cause of action against Fr. Donovan by the time the six year relationship ended.[5] That Ms. Pritzlaff was unaware of additional harm ("severe emotional distress") only created uncertainty as to the amount of damages and did not toll the period of limitations. *See Marsha V.*, 231 Cal. App. 3d at 273.

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[4] Causes of action for breach of contract to marry, alienation of affections and criminal conversation which accrued after 1971 were abolished by sec. 768.01, Stats. Thus, any claim based upon these statutes is either abolished if it accrued in 1992 or untimely if it accrued earlier.

[5] Ms. Pritzlaff does not allege that she repressed what occurred. Therefore, even if she repressed the "coercive nature" of the relationship until 1992, Abrahamson, J., dissent slip op. at 2-3, she did not repress the alleged fact that the sexual conduct was a result of "force" and was "without her consent." Forced sexual contact in and of itself causes actual damage.

In support of her claim that the discovery rule should apply, Ms. Pritzlaff relies primarily on *Byrne v. Bercker*, 176 Wis. 2d 1037, 501 N.W.2d 402 (1993). There, this court held that the plaintiff's claim was barred because, "it is undisputed, indeed it is acknowledged in plaintiff's brief, that plaintiff was aware by mid-1986 [more than two years before she commenced her action] that her difficulties stemmed from incestuous abuse by her father and that she had been told that she was the victim of the abuse and was not the perpetrator." *Byrne*, 176 Wis. 2d at 1046.

However, the *Byrne* court also stated its approval of the holding of the court of appeals in *Hammer v. Hammer*, 142 Wis. 2d 257, 418 N.W.2d 23 (Ct. App.), *rev. denied*, 144 Wis. 2d 257, 418 N.W.2d 23 (1987). Often cited nationally,[6] *Hammer* put the Wisconsin courts at the forefront of allowing claims of incest to proceed to trial long after the alleged events.[7]

In *Hammer*, a woman alleged that she was sexually abused by her father from the age five to age of fourteen (1969-78). *Hammer*, 142 Wis. 2d at 261. She reported this activity to her mother in 1978, but both her father and mother denied the conduct and trivialized it. *Id.* "He convinced Laura that she was not injured by the conduct but that she was at fault for her problems and for the family's problems." *Id.* The plaintiff "alleged that during

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[6] *See e.g. Blackowiak v. Kemp*, 528 N.W.2d 247, 253 (Minn. App. 1995); *D.P. v. M.J.O.*, 640 N.E.2d 1323, 1327 (Ill. App. 1 Dist., 1944); *Weathers v. Fulgenzi*, 884 P.2d 538, 542 (Okla. 1994); *Farris v. Compton*, 652 A.2d 49, 63 n.24 (D.C. App., 1994); *Sawtell v. E.I. Du Pont De Nemours and Co., Inc.*, 22 F.3d 248, 250 n.6 (10th Cir., 1994).

[7] Comment, *Lemmerman v. Fealk: A "Reasonableness" Solution Allows Michigan's Incest Victims Greater Access to the Courts*, 71 U. Det. Mercy L. Rev. 943, 954 (1994).

the course of the abuse, . . . she was unable to perceive or know the existence or nature of her psychological and emotional injuries. These manifestations continued to operate on her long after the incidents, . . . preventing her from perceiving her psychological and emotional injuries and their connection to her father's earlier acts." *Id.* at 261-62. She commenced suit in 1985. The court of appeals held "that a cause of action for incestuous abuse will not accrue until the victim discovers, or in the exercise of reasonable diligence should have discovered, the fact and cause of the injury." *Id.* at 264.

The *Hammer* decision was codified in 1987. Section 893.587, Stats. (1993-94) provides:

> **893.587 Incest; limitation.** An action to recover damages for injury caused by incest shall be commenced within 2 years after the plaintiff discovers the fact and the probable cause, or with the exercise of reasonable diligence should have discovered the fact and the probable cause, of the injury, whichever occurs first.

Thus, in cases alleging incest, a plaintiff may rely on the discovery rule to avoid a motion to dismiss on the pleadings where she alleges that she was unable to forge a connection between the abuse and her latent emotional injuries despite the exercise of reasonable diligence, even though the plaintiff does not allege that she repressed all memories of the abuse.

One aspect of *Hammer* gives us pause. The defendant in *Hammer* asserted that the statute of limitations should have begun to run because the plaintiff in that case discovered, or should have discovered, the injury when the abuse ended after she reported it to her mother. *Hammer*, 142 Wis. 2d at 261, 267. The court of appeals dismissed this argument with one sentence, stating that a

"claimant has leeway to not start an action until she knows more about the injury and its probable cause." *Id.* at 267 (*citing Borello*, 130 Wis. 2d at 420). However, the *Hammer* court took this statement by the *Borello* court out of context.

The *Borello* court cited this statement in explaining that the discovery rule had been informally recognized in at least one case prior to *Hansen*. *Borello*, 130 Wis. 2d at 420. That case was *Wisconsin Natural Gas v. Ford, Bacon & Davis Construction Corp.*, 96 Wis. 2d 314, 291 N.W.2d 825 (1980). There the plaintiff discovered a "casing short" in a pipeline installed by the defendant more than six years (the applicable statute of limitations) prior to commencing suit. *Id.* at 318-19. Based on testimony that such shorts are a "usual phenomena" and may result from factors other than improper pipeline installation, this court held that a single "casing short" did not give the plaintiff sufficient knowledge that the defendant had committed a tortious act, thus the statute of limitations did not begin to run at that point. *Id.* at 325. Instead, the statute of limitations began to run when the evidence of injury was "sufficiently significant to alert the injured party to the possibility of a defect." *Id.* Thus, the statement in *Borello* that a "claimant ha[s] leeway to not start action until it knows more about the injury and its probable cause," *Borello*, 130 Wis. 2d at 420, does not mean that a plaintiff can delay action until the extent of the injury is known, but only, consistent with the explanation of the discovery rule above, that the statute of limitations does not begin to run until the plaintiff has sufficient evidence

that a wrong has indeed been committed by an identified person.[8]

Moreover, the *Hammer* decision and its subsequent codification are best viewed as a specialized discovery rule applicably only to cases of incest. The rule focuses on the unique harms and relationships between the tortfeasor and victims which exist in cases of incest. For example, what is unfortunately a fairly typical fact scenario in incest cases was described in *Hammer*. There, the conduct occurred in secret and was accompanied by threats that harm would come to the victim if she ever told anyone about it and the victim was repeatedly told that she had caused the acts and that they were her fault. *Hammer*, 142 Wis. 2d at 261; *see also* Note, *The Statute of Limitations Barrier in Civil Suits Brought by Adult Survivors of Child Sexual Abuse: A Simple Solution*, 1994 U. Ill. L. Rev. 417, 421 (1994). Further, because of these relationships and types of factual situations, and because of the age of the victims, oftentimes victims do not realize the wrongfulness of the acts. Note, *Forging the Causal Link: Reasonable Delay in Commencing Action for Childhood Sexual Abuse*, 27 Suffolk U. L. Rev. 749, 760 n.55 (1993). Thus, for reasons of public policy, a special discovery rule has been created for these cases in an effort to provide adequate protection to children who "have been harmed because of a 'most egregious violation of the parent/child relationship.' " *Hammer*, 142 Wis. 2d at 267 (*quoting* Com-

[8] This court was not faced with a similar potential defense in *Byrne* because there the plaintiff alleged that she had repressed all memory of the alleged abuse. *Byrne*, 176 Wis. 2d at 1039. Further, even if that defense had been presented, the legislative intent to codify the *Hammer* decision would have made such a defense untenable.

ment, *Tort Remedies for Incestuous Abuse*, 13 Golden Gate U. L. Rev. 609, 631 (1983)).

But here sound public policy requires that the discovery rule should not save a claim under the facts of this case. This court has stated that the discovery rule will apply only when allowing meritorious claims outweighs the threat of stale or fraudulent actions. *Hansen*, 113 Wis. 2d at 559. Extending the discovery rule to this case would cause unfairness to a defendant who is forced to attempt to defend a suit for emotional and psychological injuries in which the alleged conduct took place over twenty-seven years ago and increase the potential for fraud.

Any time a claim is raised many years after the injury occurred, the potential for fraud is exacerbated. However, in most cases that potential is at least limited by the fact that the plaintiff is suffering from physical symptoms that a jury can see evidence of and which can be directly traced to the tortious conduct. For example, the IUD in *Hansen* caused pelvic inflammatory disease, and the furnace in *Borello* caused a myriad of respiratory problems. But here the alleged damages are all "emotional" and "psychological," with the plaintiff's experts claiming that damage exists and was caused by the defendant, and the defendant left in the position of attempting to prove either that the plaintiff is not "emotionally damaged" or that he is not the cause of that damage. "While some courts may have blind faith in all phases of psychiatry, this court does not." *Steele v. State*, 97 Wis. 2d 72, 97, 294 N.W.2d 2 (1980). "Nor are we convinced that even careful cross-examination in this esoteric and largely unproved field is likely to reveal the truth." *Id.*

Such circumstances are ripe for fraudulent claims even when the alleged cause of the injury occurred only weeks prior to the initiation of suit. When one adds to this that

"this court has frequently been dismayed by the examination of trial court records which showed a marked propensity of those who purport to have psychiatric expertise to tailor their testimony to the particular client whom they represent," *id.*, fraud becomes a distinct possibility. Thus, unlike in *Hansen*, allowing what could be meritorious claims of this nature does not outweigh the threat of stale or fraudulent actions.

Although not relied upon by Ms. Pritzlaff, we feel it is necessary in order to fully explain the law related to this subject to distinguish this case from the closely analogous conduct prohibited by the sexual exploitation by a therapist statutes. Those statutes, enacted in 1985, provide in part:

> **895.70 Sexual exploitation by a therapist.** (1) DEFINITIONS. . . . (e) "Therapist" means a . . . member of the clergy . . . who performs or purports to perform psychotherapy.
>
> (2) CAUSE OF ACTION (a) Any person who suffers, directly or indirectly, a physical, mental or emotional injury caused by, resulting from or arising out of sexual contact with a therapist who is rendering or has rendered to that person psychotherapy, . . . has a civil cause of action against the psychotherapist . . . .
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> **893.585 Sexual exploitation by a therapist.** (1) . . . an action under s. 895.70 for damages shall be commenced within 3 years after the cause of action accrues or be barred.
>
> (2) If a person entitled to bring an action under s. 895.70 is unable to bring the action due to the effects of the sexual contact or due to any threats . . . from the therapist, the period of inability is not part of the time limited for the commencement of the action, except that this subsection shall not extend the time limitation by more than 15 years.

These statutes may be somewhat in conflict with the discovery rule as described above. One possible reason for this is that this statute, like the incest statute, is designed to protect a class of persons who the legislature feels need special protection. People who consult therapists generally do so because they perceive that they have a mental or psychological problem and hope that the therapist has the means and the method to help them. The therapists have been the exponents of the theory that sexual exploitation can result in suppression of memory of such acts and psychological problems arising out of feelings of guilt that are suppressed and buried. The assumed fact that therapists are aware of such potential results leaves them with no excuse for using their professional position to obtain sexual gratification from their vulnerable patients. Thus, there is a rational basis for subjecting therapists to special statutory provisions in an attempt to reduce or eliminate such exploitation of their patients. Regardless of the reason for the statute, the limited scope of the statute supports the explanation of the discovery rule above. The legislature enacted the provision well after the discovery rule had been announced by this court. Therefore, its enactment demonstrates that the legislature concluded that the discovery rule would not apply to sexual exploitation by therapists absent legislative action.

Since we conclude that Ms. Pritzlaff's claim is time barred, we could end our analysis at this point. However, the question of whether a religious governing body is liable for negligence in hiring, retaining, training or supervising their "employees" (clergymen) who commit acts which are outside the scope of their employment is a matter of great public importance and has been fully briefed by the parties. *See In Matter of Guardianship of L.W.*, 167 Wis. 2d 53, 66, 482 N.W.2d 60 (1992) (issues of great public

importance may be decided even if moot). Moreover, the decision of the court of appeals in this case is in conflict with a decision issued the same day by a different panel of the court of appeals. *Compare Pritzlaff v. Archdiocese of Milwaukee*, Appeal No. 93-1846 (Ct. App. Aug. 23, 1994) *with Jane Doe v. Archdiocese of Milwaukee*, Appeal No. 93-2074 (Ct. App. Aug. 23, 1994). Further, a number of cases of this sort are pending, both at circuit courts and at the court of appeals. *See In Matter of Guardianship of L.W.*, 167 Wis. 2d at 67 (issue may be decided although moot where the issue is likely to arise again and should be resolved by the court to avoid uncertainty). Thus, although the point is moot in this particular case, it is an issue which led this court to grant review in this case. Therefore, a decision is appropriate.

We conclude that even if Ms. Pritzlaff's claim were not time barred, it would still fail to state a claim against the Archdiocese upon which relief could be granted. Ms. Pritzlaff alleges that the Archdiocese was negligent in the hiring, training and supervision of Fr. Donovan. This court has not determined whether such a cause of action exists in Wisconsin. *See Midwest Knitting Mills, Inc. v. U.S.*, 950 F.2d 1295, 1298 (7th Cir., 1991). However, for purposes of this case we assume, but do not decide, that it does,[9] and we look to other courts for the elements of the claim.

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[9] More precisely, we assume that the cause of action existed at the time of the alleged conduct by Fr. Donovan. *See Duncan v. Steeper*, 17 Wis. 2d 226, 116 N.W.2d 154 (1962) (court required to allow the defense of charitable immunity because the defense was recognized when the tort was committed); *Isley v. Capuchin Province*, 880 F. Supp. 1138, 1154 (E.D. Mich. 1995) (applying Wisconsin law to a delayed discovery claim).

To establish a claim for negligent hiring or retention, Ms. Pritzlaff would have to establish that the Archdiocese was negligent in hiring or retaining Fr. Donovan because he was incompetent or otherwise unfit. *Id.* But, we conclude that the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices. Therefore, Ms. Pritzlaff's claim against the Archdiocese is not capable of enforcement by the courts.

The rationale for this rule was recently aptly summarized by a pair of commentators as follows:

> Examining the ministerial selection policy, which is 'infused with the religious tenets of the particular sect,' entangles the court in qualitative evaluation of religious norms. Negligence requires the court to create a 'reasonable bishop' norm. Beliefs in penance, admonition and reconciliation as a sacramental response to sin may be the point of attack by a challenger who wants a court to probe the tort-law reasonableness of the church's mercy toward the offender. . . . The tort of negligent selection of unsuitable teachers has been recognized in civil courts. If negligent selection of a potential pedophile for the religious office of priest, minister or rabbi is a tort as to future child victims, will civil courts also hear Title VII challenges by the non-selected seminarian against the theological seminary that declines to ordain a plaintiff into ministry because of his psychological profile? How far shall the courts' qualitative entanglement with religious selectivity extend?

O'Reilly & Strasser, *supra*, at 47 (footnotes omitted).

Our conclusion is consistent with the principles enunciated by our founders as well as with nearly a century of United States Supreme Court jurisprudence. As Thomas

Jefferson wrote in 1808, the government is "interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline or exercises." O'Reilly & Strasser, *supra*, at 44 (*quoting* Letter of Thomas Jefferson to Reverend Samuel Miller (Jan. 23, 1808), in 5 Phillip Kurland & Ralph Lerner, *The Founders' Constitution* 98 (1987)). As early as 1929 the United States Supreme Court held that it is the function of church authorities to determine what the essential qualifications of a clergy person are and whether the candidate possesses them. *Gonzalez v. Roman Catholic Archdiocese of Manila*, 280 U.S. 1, 16 (1929). More recently, the United States Supreme Court has stated, "[f]reedom to select the clergy . . . must now be said to have federal constitutional protection as part of the free exercise of religion against state interference." *Kedroff v. St. Nicholas Cathedral of Russian O. Ch.*, 344 U.S. 94, 116 (1952); *see also Rayburn v. General Conf. of Seventh Day Adventists*, 772 F.2d 1164, 1167-68 (4th Cir., 1985), *cert. denied* 478 U.S. 1020 (1986) (the right to choose clergy without government restriction underlies the well-being of the religious community), *but see Moses v. Diocese of Colorado*, 863 P.2d 310, 320, 328 (Colo. 1993), *cert. denied*, 114 S.Ct. 2153 (1994) (First Amendment did not preclude negligent hiring claim where Diocese knew of priest's problems of depression, low self-esteem, and his struggle with his sexual identity).

Recent decisions of the courts of this state also support our conclusion that negligent hiring and retention claims cannot be heard by courts in this state for constitutional reasons. *See Olston v. Hallock*, 55 Wis. 2d 687, 696-97, 201 N.W.2d 35 (1972) (court could not constitutionally review a religious institution's decision to terminate a minister); *Black v. St. Bernadette Congregation*, 121 Wis. 2d 560, 565-66, 360 N.W.2d 550 (Ct. App. 1984) (matters

of internal church government are at the core of ecclesiastical affairs and as such are beyond the province of judicial review); *see also Isley*, 880 F.Supp. at 1150-51 (E.D. Mich. applying Wisconsin law).

Although state inquiry into the training and supervision of clergy is a closer issue than inquiry into hiring and retention practices because under some limited circumstances such questions might be able to be decided without determining questions of church law and policies, it is nonetheless prohibited by the First Amendment under most if not all circumstances.[10] As one court stated in refusing to allow a claim for negligent supervision:

> [A]ny inquiry into the policies and practices of the church Defendants in hiring or supervising their clergy raises the same kinds of First Amendment problems of entanglement discussed above, which might involve the court in making sensitive judgments about the propriety of the church Defendants' supervision in light of their religious beliefs. . . . The traditional denominations each have their own intricate principles of governance, as to which the state has no right of visitation. Church governance is founded in scripture, modified by reformers over almost two millennia.
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> . . .
>
> It would therefore also be inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop. Any award

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[10] Even if it were not, there is a possibility that Ms. Pritzlaff would not recover on her claim. At least one state has held that employers are not liable for failure to supervise when the employee engages in independent criminal conduct which results in the plaintiff's injuries. *See Tichenor v. Roman Catholic Church of New Orleans*, 32 F.2d 953, 960 (5th Cir., 1994) (explaining Miss. law).

> of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause.

Schmidt v. Bishop, 779 F. Supp. 321, 332 (S.D.N.Y., 1991); *see also Roppolo v. Moore*, 644 So.2d 206, 208 (La. App. 4 Cir. 1994) (*quoting* the United States Supreme Court decision in *Watson v. Jones*, 13 Wall. 679, 729, 20 L.Ed. 666 (1871)) (recognizing the threat of harassing lawsuits and a potential for a "chilling effect" on the free exercise of religion if the courts are to determine after the fact that ecclesiastical authorities negligently supervised or retained a member of the clergy).

We are aware of the fact that several courts have recently held that a religious governing body could be held liable for negligent supervision where the plaintiff alleges that the body knew that the individual clergyman was potentially dangerous. *See* O'Reilly & Strasser, *supra*, at 49-51 (collecting cases from New York, Colorado and Ohio). The rationale of these courts is summarized by the following quote from the Ohio Supreme Court, "even the most liberal construction of the First Amendment will not protect a religious organization's decision to hire someone who it knows is likely to commit criminal or tortious acts." *Byrd v. Faber*, 565 N.E.2d 584, 590 (Ohio, 1991). However, we find these cases unpersuasive, at least given the facts of this case.

Further, one state that recognizes the tort of negligent supervision provides that employers do not have a duty to supervise when the employees are off-duty or not working. *See Tichenor*, 32 F.3d at 960 (explaining Miss. law). Problems of excessive entanglement seem inevitable if the court is asked to determine whether a priest, minister

or rabbi was on or off duty when he engaged in conduct that was against the laws of the religious denomination and beyond the scope of his employment.

In conclusion, our holding is limited to the following issues. We hold that Ms. Pritzlaff's claim against the Archdiocese is time barred. We further hold that, assuming they exist at all, the tort of negligent hiring and retention may not be maintained against a religious governing body due to concerns of excessive entanglement, and that the tort of negligent training or supervision cannot be successfully asserted in this case because it would require an inquiry into church laws, practices and policies. Therefore, we reverse that portion of the decision of the court of appeals which remanded the case for a trial on the negligent supervision claim against the Archdiocese.

By the Court—The decision of the court of appeals which remanded the case against the Archdiocese for a trial on the negligent supervision claim is reversed.

Justice Janine P. Geske took no part.

[Filed June 27, 1995]

No. 93-1846

STATE OF WISCONSIN : IN SUPREME COURT

JUDITH M. PRITZLAFF,

Plaintiff-Appellant,

v.

ARCHDIOCESE OF MILWAUKEE,

Defendant-Respondent-Petitioner,

REVEREND JOHN T. DONOVAN,

Defendant-Respondent,

ARIZONA HEALTH CARE COSTS CONTAINMENT SYSTEM AND HEALTH CARE FINANCING ADMINISTRATION,

Defendants.

HEFFERNAN, CHIEF JUSTICE (dissenting). I dissent because the majority apparently has misread the allegations of the plaintiff's complaint.

As the majority correctly states, plaintiff alleges, ". . . she has suppressed and been unable to perceive the existence . . . of her psychological and emotional injuries until approximately April, 1992." (Majority slip opinion, p. 4).

The allegation is plain that she did not "perceive" her injuries until April of 1992. If this allegation is true, a

matter that must eventually be decided at trial, she has brought her action within the period of limitations.[1]

The majority would object to this result because it relies on the discovery rule, i.e., that a cause of action does not accrue until the victim is not only aware of the injury but also must be aware of the cause of the injury.

That statement of the discovery rule is substantially correct, but the majority would insist that, because plaintiff alleges that she knew of the coerced sexual episode when it occurred and knew the identity of the tortfeasor, the cause of action accrued instanter. This overlooks the allegation that it was not until April of 1992 that she "perceive[d] the *existence* of her psychological and emotional injuries."

As I understand the complaint, it does not seek damages for whatever injury or trauma was occasioned at the time of the alleged sexual misconduct. It seeks damages for emotional and psychological harm which subsequently ensued and which could not be objectively associated with the original misconduct until decades later.

Thus the plaintiff alleges a harm of which she was unaware until 1992. Whether that allegation is in fact true must be decided by a factfinder not by a court on motion to dismiss. The majority opinion by its reference to the pleadings demonstrates that a material fact is in dispute.

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[1] We also point out that the explanation or supplementation of the claim at oral argument (see slip opinion page 11) is legally irrelevant at this stage of the proceedings. Neither party on oral argument in this court can amend its pleadings to either defeat or facilitate an order to dismiss. I believe it highly irregular to utilize the material referred to; and, of course, as pointed out, it is irrelevant.

The majority would further insist that the discovery rule, were it technically applicable, should, as a matter of public policy, not be applied to permit a litigant to get to a jury on so stale a claim. There is much philosophically to support the majority's position. Memories grow faint and proof is more difficult to produce as time passes, but the burden of proof is on the plaintiff and not upon the defendant. Also, the particular type of tort alleged is an emotionally charged one that may have a tendency to skew memories and stir old emotions. However, from a legal viewpoint, such problems can be handled by a factfinder, judge or jury, by appropriate instructions that caution a jury to be mindful that the lapse of time and the emotionally charged nature of the tort should be considered when evaluating evidence produced by either the plaintiff or defendant, bearing in mind the proper allocation of the burden of proof.

I share the majority's skepticism of proof that may be offered in a case of this kind,[2] but that is not sufficient reason to ignore a claim which is actionable by the application of the discovery rule.

The majority urges that the bringing of a stale claim is contrary to public policy. Of course, all causes of action that rely on the discovery rule are, in the absence of that rule, stale claims. They are, however, not stale if they have accrued, as is alleged here, within the period

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[2] The refreshing or stimulation of latent memories upon the goading of "therapists" is sometimes suspect. The possibility of suggesting a scenario to a disturbed and injured person should be carefully scrutinized by courts and juries, and it is the factfinder, usually the jury, who should pass upon the credibility of the evidence. It is not the function of this court to do so unless evidence presented is incredible as a matter of law.

of limitations. It is accepted as good public policy, as enunciated by the legislature, to allow claims to go forward if the claim has accrued, as appears from the face of the complaint, within the three-year period of limitations.

Moreover, as we stated in *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 560, 335 N.W.2d 578 (1983), the discovery rule is to be applied to all cases except where the legislature has specifically provided otherwise. It has not done so in respect to the facts here. Rather than furthering public policy the majority contravenes the public policy determined by the legislature.

While I understand the sentiments of the majority, the position taken is legally insupportable. Accordingly I dissent.[3]

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[3] The dissenting opinion of Justice Abrahamson points out that Donovan's case is not before us. She also points out that the majority reached the conclusion that therefore this action against the Archdiocese is barred. It seems to me that the appropriate disposition of this case, in view of its posture in this court, is to dismiss as improvidently granted.

[Filed June 27, 1995]

No. 93-1846

STATE OF WISCONSIN : IN SUPREME COURT

JUDITH M. PRITZLAFF,

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v.

ARCHDIOCESE OF MILWAUKEE,

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REVEREND JOHN T. DONOVAN,

Defendant-Respondent,

ARIZONA HEALTH CARE COSTS CONTAINMENT SYSTEM AND HEALTH CARE FINANCING ADMINISTRATION,

Defendants.

Shirley S. Abrahamson, J. (dissenting). I dissent because I conclude as did the court of appeals, that the factual dispute regarding the plaintiff's discovery of her claim against Donovan (the priest) should be determined at trial. I also conclude that the court should not, at this stage of the proceeding, decide the plaintiff's claims against the Archdiocese.

Before I proceed to discuss these issues, I must point out that this case is in an odd procedural posture. The court of appeals remanded the case for a full trial on the plaintiff's claims against Donovan. Donovan did not seek review in this court in a timely fashion. Only the Archdiocese sought review. After the time for the petition for review expired Donovan then petitioned this court to join

the Archdiocese's petition for review. Because the time for his petition for review had expired and there was no procedure for extending that time, this court refused to allow Donovan to join in this review of the decision of the court of appeals. It would therefore appear that the cause of action against Donovan may proceed even after this decision. Should a circuit court absolve Donovan of liability, the plaintiff's claims against the Archdiocese necessarily fail. I therefore conclude that the majority opinion may very well be premature in deciding the cause of action against the Archdiocese.

With regard to the statute of limitations issue, the majority aptly acknowledges that the discovery rule "tolls the statute of limitations until the plaintiff discovers . . . that he or she has suffered actual damage . . . ." Majority op. at 10. The majority, however, determines that the rule does not apply in this case because it fails to apply the well-settled rule that courts liberally construe the allegations presented in the complaint and accept them as true for purposes of determining whether a claim is stated. *Paskiet v. Quality State Oil Co.*, 164 Wis. 2d 800, 805, 476 N.W.2d 867 (1991).

The plaintiff claims that her coping mechanisms prevented her from being able to perceive the actual damage caused by Donovan's alleged sexual advances until April 1992. She also alleges that Donovan used his position as a priest to coerce her into a sexual relationship. Accepting both of these allegations as true leads to the conclusion that the plaintiff was not cognizant of the coercive nature of the relationship until 1992. If, as the plaintiff asserts, she was unaware of actual damage until 1992, she could not have had a claim capable of enforcement in 1965, according to our prior cases.

Instead, the majority opinion states that sound public policy requires that the discovery rule is not applicable to the case. Majority opinion at 16. The majority suggests that claims of emotional and psychological injury are more easily subject to fraud than claims of physical injury. Majority op. at 18. Thus the majority opinion rests on grounds long discarded by this court in other cases. *See, e.g., Bowen v. Lumbermens Mut. Cas. Co.*, 183 Wis. 2d 627, 636-61, 517 N.W.2d 432 (1994) (discussing the history of the court's treatment of emotional distress in an action for negligent treatment of emotional distress).

The defendants counter Pritzlaff's claims in a more straightforward manner, suggesting that she could have discovered her injury and its cause at any time and that the statute of limitations therefor bars the suit. As the court of appeals concluded, "[t]he factual impasse between Pritzlaff's knowledge of the events and her professed inability to relate them to her injuries presents a factual issue inappropriate for determination on a motion to dismiss. . . . Therefore, it was inappropriate for the trial court to dismiss the action without a full determination of the facts." *Pritzlaff v. Archdiocese of Milwaukee and Reverend John T. Donovan*, Court of Appeals opinion filed August 23, 1994 at 7.

After deciding that the Archdiocese cannot be held liable because the statute of limitations bars the cause of action against Donovan, the court reaches out to discuss other issues that do not affect the decision of the case.

The court refuses to decide a straightforward issue of state tort law, that is whether the state recognizes a tort of negligence in hiring, retaining, training or supervising employees. But, the majority eagerly reaches out to decide a federal constitutional issue. The majority holds that

if such a tort existed in this state, it would be barred in this case by the First Amendment. Thus the court engages in a "double reach."

The majority's reaching out to decide a First Amendment constitutional issue in this manner violates basic rules of judicial decisionmaking. A court will ordinarily not consider constitutional issues unless such a decision is essential to the determination of the question before the court. *State v. Hamilton*, 120 Wis. 2d 532, 540, 356 N.W.2d 169 (1984). The majority concedes that its determination of this claim is not essential. Majority op. at 20.

A court should be especially reluctant to volunteer to tackle a First Amendment issue relating to establishment of religion and the prohibition of the free exercise of religion. It is generally acknowledged that this area of First Amendment law is in flux and the United States Supreme Court cases offer very limited guidance.

For the reasons set forth, I cannot join the majority opinion.

(Letterhead Of)

SUPREME COURT OF WISCONSIN
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880

MARILYN L. GRAVES
CLERK

SEPTEMBER 19, 1995

TO: * * * * *

YOU ARE HEREBY NOTIFIED THAT THE COURT ENTERED THE FOLLOWING ORDER:

DISTRICT 1
PRITZLAFF, J. v. ARCHDIOCESE- 93-1846

THE COURT HAVING CONSIDERED THE MOTION FOR RECONSIDERATION FILED BY THE PLAINTIFF-APPELLANT AND THE RESPONSE FILED BY THE DEFENDANT-RESPONDENT-PETITIONER,

IT IS ORDERED THAT THE MOTION FOR RECONSIDERATION IS DENIED WITH COSTS.

Justices Janine P. Geske and Ann Walsh Bradley did not participate.

MARILYN L. GRAVES
CLERK OF SUPREME COURT